IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE

WRIT PETITION NO 3521 OF 1999

1. Shri Purshottam Shankar Shetye,
since deceased through his legal
heirs and representatives;

(a) Vasundhara Purshottam Shetye,
Occupation nil, Room No. 15,
Choksi Bldg., Ranade Road,
Extension Dadar.

(b) Ujwala Hari Shinde,
Occupation Housewife,
3/18, Samantha Nagar, Sion,
Chuna Bhatti, Mumbai -22. ... Petitioners

Vs.

Smt. Malti Rajaram Parshetye,
Occupation Nil,
Residing at Dinanath Terrace,
L.J. Road, Shivaji Park,
Dadar, Mumbai 400 016 ..Respondent.

Mr. P.N. Joshi for the petitioners.
Mr. U.S.R. Singh for the respondent.

CORAM : ANOOP V.MOHTA J.

DATE : 9TH AUGUST, 2005.

ORAL JUDGMENT

. The petitioner is the original plaintiff and the respondent is the original defendant. The controversy revolving around a shop styled as," Mascric Biddi Works" having measurement 9’ X 15’ situated at Dadar Mumbai.

The late husband of respondent Mr. Rajaram Appa Parhsetye, as he was sick at that time, entered into a conducting agreement dated 2/1/1966 for 11 months with the petitioner and allowed his running business to conduct in the name and style as "Masric Bidi Works" On 26/3/1967, the respondent being a Pardanshin housewife and sick, and as was unable to run the shop, she entered into a similar agreement on 1/7/1967. Such agreements were renewed from time to time. The last agreement therefore, entered into between the parties on 14th February, 1987. The respondent, however, requested to handover the said running business with premises. The last day, as per the last agreement for conducting the business was 14th January, 1988. The petitioner, instead of handing over the business, and premises preferred the R.A.D. suit No. 649 of 1988, in the Small Causes Court, Bombay (trial Court) on 12/2/1988. The same was resisted by the written statement. The learned trial Court after considering the rival contentions, as well as, the evidence led by the parties, by an order dated 3rd August 1995, dismissed the suit for declaration as sought i.e. protected sub-tenant, as contemplated under Bombay Rent, Hotel And Lodging House Rates Control Act, 1947 (for short Bombay

Rent Act).

2. In the meantime, the respondent has filed suit B.C.C.V. Suit No.979 of 1990 for declaration and for recovery of possession of suit business against the petitioner on 30/1/1990 and same is still pending.

3. The deceased petitioner therefore, preferred an appeal No. 370 of 1995, before the appellate Court, a Bench of the Small Causes Court at Bombay on 11/9/1995. After hearing both the parties, by the impugned judgment and order dated 12/10/1998, the said appeal was also dismissed. Therefore the present writ petition.

4. Heard the learned Counsel appearing for the parties. The basic conducting agreement dated 2nd January, 1966 and its surrounding circumstances, are relevant to decide the present litigation between the parties. Therefore, the relevant clauses of the agreement are reproduced as under;

> " 1. That the Municipal Licence of the said Bidi shop which is registered at No. L of B.M. 3975 will continue to remain in the name of the owner."

" 2. This agreement shall commence from the date of these presents and shall be for a period of eleven months only i.e. till 1st day/Decemberm 1966."

"3. The Hirer shall pay Rs. 268.35 Np. (Two hundred and Sixty eight and thirty five paise only) as Royalty or Swamitwa to the Owner per month on or before the 15th day of every month. This sum shall be inclusive of the monthly rent of the shop premises."

"4. The Electric consumption charges will be paid by the Hirer to the BEST."

"5. The Hirer shall pay all the fees of renewal of licenses."

"6. The HIrer shall be responsible for the payment of salaries to the servants, if any, employed at the shop."

"7. The Hirer shall not claim any right or interest in the shop and shall return the same to the Owner without any incumberences."

"8 The Hirer shall be liable for any liability which may be incurred after the execution of this Agreement."

"9. The Hirer shall keep a sum of Rs. 4,400/- (Rupees Four Thousand Four Hundred only) as deposit with the Owner and for the due observance of the terms and conditions of this Agreement. This sum shall be refundable to the Hirer after the expiry of the term of this Agreement after deducting the sum of any arrears which may be remained unpaid."

"10. If any party choses to terminate this agreement, it shall give one month’s written notice to the other party."

"11. Whenever the Licensee stops conducting this business and delivers possession to the Owner, whatever goods are left in the shop, they

> shall be taken away by the Licensee. The owner shall not be forced to keep them."

The last agreement dated 14th February, 1987, was on the same terms and conditions agreed between the parties. This agreement therefore, has been strongly relied by the petitioner, in support of his submission and prayed that as the petitioner-plaintiff has been in exclusive possession of the premises since 1966. Therefore, prayed for the said protection through the suit.

5. The agreement admittedly, between the parties was to run the existing business in the name and style as "Masric Beedi Works". This agreement made it very clear that the owner-the respondent, was in possession of Bidi shop in question. As requested by the petitioner-hirer, it was allowed to conduct the said business on terms and conditions as agreed. These terms as referred above, specify the words "Hirer and Owner" The licence of the said bidi shop, as agreed, has been remained in the name of the owner. The agreement was for 11 months only. The hirer agreed to pay Rs. 268.35 as royalty to the owner per month. The electric charges payment, as agreed paid by the hirer including the renewal of licence. The payment of salaries of the

servants were the responsibility of the hirer. It was agreed that the hirer should not claim any right or interest in the shop and return the same to the owner without any incumberences whever demanded. It was further agreed to issue one month’s written notice if either party choses to terminate the agreement. It was also agreed between the parties, that at the end of this conducting business, the left out stocks and the goods out in the shop, should be removed by the hirer. The refundable amount of Rs. 4,400/- has been deposited with the owner. subject to the deduction of any arrears, if any.The said agreement, has also endorsed the receipt of the amount of Rs. 4400/-.

6. These terms therefore, from time to time made very clear that it was an agreement of conducting the business and for conducting such business the possession has been with the petitioner-hirer. There is nothing in this agreement, which has created any interest in the property in question. There is no mention about any exclusiveness of the premises as licensee as or tenant or sub-tenant. On the plain reading of the agreement itself shows that there was no intention to create any sort of lease or licence.

7. The learned Counsel appearing for the petitioner submitted, based on (Shri Varisali Mohammed Ilias V. Abdul Sattar Gulam Hussain) (1992 (1) Bom. C.R. 27),

that as the petitioner have been in possession of the premises since 1966, they are entitled to get the protection under section 15A of the Bombay Rent Act. To this submission, the learned Counsel appearing for the respondent has placed on the record the judgments wherein the Bombay High Court, refused to grant such protection to such conductor of the business, based on such agreement. A list of which is as under;

1. 24 Bom. R.C. 1987 (Ratanlal Gulabji Bhati V. Himmatlal Hukumji Parihar).
2. 1988 Bom. R.C. 274 (Abhya Divekar & others V. Dr. Nalini Kantilal Parekh and others)
3. 1999 Bomb. R.C. 366 (Mrs. Fatimabai Noor Mohamed V. M. Khallil Ahmed and another)

8. The next submission made, based on the said agreement itself, that intention of the parties was to create lease and or atleast licence and as uninterruptedly, the said agreements have been renewed from time to time, the exclusive possession has been

with the licensee till this date. The reliance has been made on **AIR 1959 S.C. 1262 (Associated Hotels of India Ltd. V.s R.N. Kapoor)**.

9. The Apex Court in Associated Hotels of India Ltd., has enunciated the following proposition to consider the distinction between alease and a licence. Those are ;

‘ "1. To ascertain whether a document creates a licence or lease, the substance of the document must be preferred to the form; (2) the real test is the intention of the parties- whether they intended to create a lease or a licence; (3) if the document creates an interest in the property, it is a lease; but, if it only permits another to make use of the property, of which the legal possession continues with the owner, it is a licence; and (4) if under the document a party gets exclusive possession of the property "prima facie, he is considers to be a tenant’ but circumstances may be established which negative the intention to create a lease."

The Apex Court in A.I.R. 1968 S.C. 919 (V. 55 C183) (Konchada Ramamurty Subuddhi (dead) V. Gopinath Naik & Others) in para 8 observed as under;

> "The following propositions may therefore, betaken as well established (1) to ascertain whether a document creates a licence or lease, the substance of the document must be preferred to the for; (2) the real test is the intention of the parties-whether they intended to create a lease or a licence; (3) if the document creates an interest in the property, it is a lease but if

> it only permits another to make use of the property of which the legal possession continues with the owner, it is a licence; and (4) if under the document a party gets exclusive possession of the property, prima facie, he is considered to be a tenant but circumstances may be established which negative the intention to create a lease."
>
> "There is one golden rule which is of very general application namely, that the law does not impute intention to enter into legal relationship where the circumstances and the conduct of the parties negative any intention of the kind."

10. Based on the principles laid down by the Apex Court. The question is what was the intention of the parties as reflected in the agreement in question read with the surrounding circumstances. There is a sufficient material to demonstrate and prove that there was no intention to create any lease or licence in the present case. There is no question of accepting the case of the petitioner and his right/or claim of the protection as sought. The clauses referred above, are clear enough to reflect the intention of the parties that it was the agreement whereby, the petitioner-hirer was allowed to conduct the running business in the name and style as "Masric Bidi Works". The exclusiveness as alleged, even if accepted, on the foundation that the petitioner has been in possession since 1966 but the

said possession, as agreed, based on the agreement in question, between owner and hirer of the business made the thing very clear, apart from surrounding circumstances. that it was never intended to create any lease or licence in the premises. There was no intention at any point of time to create any interest in the premises, as sought to be contended by the petitioner. Therefore, the possession of the premises based on the agreement, if taken note of, that it was only the agreement of conducting the business. Therefore, there was no question of creating any lease of licence as prayed based on above referred two Apex Court's decisions.

11. The additional facet which cannot be overlooked is the definition of licensee as defined under Section 4A of the Bombay Rent Act. This aspect has been considered by the Bombay High Court in following cases.

(1) Abhay (Supra);

> "Section 5 (4A) defines "licence" in respect of any premises to be a person in occupation of the premises under a subsisting agreement for license. But his very definition carves out an exception. The " licensee" does not include, inter alia, " a person conducting a running business belonging to the licensor". The

> premises were not given to Parekhs. The conducted the hospital belong to Dr. Divekar."

(2) Mrs. Fatima (Supra)'

> "The aforesaid provisions of Section 5 (4-A) of the said act of 1947 make it abundantly clear that the permission given for conducting the said beedi business in the suit premises does not fall within the definition of the word "licence" and therefore, there is no question of protection of the present respondent under the Bombay Rent Act."

(3) Ratanlal (Supra)'

> "In this view of the matter, my view that the intention of the parties while deciding whether the transaction is of lease of licence must be mutual intention and not the unilateral intention of landlord or tenant need not be further discussed in this judgment."

12. Once the intention of the legislature is very clear to exclusive conducting business from the purview of the "licence" then there is no question to grant any protection as prayed by the petitioner. The agreement in question was entered in to some time in the year 1966 and at that time there was no such definition of licensee, which is available now. In my view that further supports the case of the owner that at the relevant time when the possession was handed over it was only with the intention to allow the hirer to run the business in question, as per the agreement between the parties. On every occasion when there was a renewal of

the agreement, the same clauses and terms and conditions were incorporated and accepted by the parties. If this intention taken note of, then again, there is no question of granting protection to such hirer or such person under the Bombay Rent Act, merely because on 1st February, 1973 such hirer was in possession of the premises in question.

13. In the present case, there is an ample material on the record to justify that after the death of Rajaram, the respondent Malti Rajaram Parshetye, being a pardanshin lady and also because of ill-health, unable to run the said business. This itself a sufficient and the circumstances further justify the case of the respondent that the intention was only to allow the petitioner to run the business, as she was not in a position to run the said business. The Varisali's case, as strongly relied by the petitioner Counsel, (Supra) is therefore, distinguishable on the fact itself. There was no written conducting business agreement between the parties. In that case. there was no material on the record to justify any disability to conduct the business and as exclusive possession was given, therefore based on the pleading, the protection as contemplated under

the Bombay Rent Act was given.

14. There is no dispute that it is the intention of the parties which is very material to consider such agreements. (Associated Hotels and Konchada) (Supra) In the present case, the document is unambiguous and surrounding circumstances justify and support the owner's case. In this background, there is no question to extend the protection in the facts and circumstances of the case, as extended in Varisali Mohamed (Supra). In the said judgment there was no question of such term "hirer" and "owner". The term " owner and hirer" referred and intended to deal with the running business in question. This terms therefore, also supports the case of the respondent-owner.

15. The Bombay High Court in Ratanlal Gulabji (Supra) while interpreting a case of conducting a running business, based on such written document and the facts and circumstances of the case, refused to extend the protection under Section 15 A the Bombay Rent Act, as prayed by the petitioner in this case. In Abhay (Supra) the similar terms in conducting the business, have been elaborated and not granted protection. In (Mrs.

Fatimabai Noor Mohamed (Supra) on identical circumstances, Bombay High Court after considering the definition of "licence" under section 5(4A) of Bombay Rent Act, refused to extent the protection as sought, as in that case also the Court has observed that the dominion intention of the parties was to create a licence of conducting the pan beedi business and incidently the premises was allowed to be used by the respondent as permissive user and held that it could not be deemed to be a protected licensee, as prayed. In all these cases, the Bombay High Court refused to interfere with the findings given by the Courts below.

16. In this background, the learned Counsel appearing for the respondent further submitted that there is no case made out by the petitioner to interfere with the concurrent findings given by the Courts below. He has relied on the various authorities on the issue of power and scope of Article 227 of the Constitution of India. The principle and scope under Article 227 of the constitution of India needs no further elaboration. In the present case, after considering the rival contentions between the parties, including the evidence led and read by the parties, I am of the view that there

is no perversity as such which need to be interfered with. The views and reasonings given by the Court below are within the frame work of law as laid down and the record. Resultantly, the petition is dismissed. Rule discharged.

17. At the request of the learned Counsel appearing for the petitioner the effect and operation of the Judgment is stayed for 8 weeks.

[ANOOP V. MOHTA, J.]